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No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *et al.*,

Petitioners,

v.

HEBEI WELCOME
PHARMACEUTICAL CO. LTD., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

According to Respondents (and the Second Circuit), federal courts may decline to exercise valid federal-question jurisdiction on the basis of a discretionary ten-factor comity inquiry that can be considered before, during, or after trial in any given case. Worse, the Second Circuit's decision deepens an entrenched circuit split by permitting foreign sovereigns to commandeer that inquiry by filing an amicus brief asserting a legal interpretation that the court is "bound" to accept, even where the record overwhelmingly refutes that interpretation. Compounding these errors, the panel disregarded the limits of its own appellate jurisdiction—in conflict with governing law in its sister circuits—in order to reach its chosen result.

The panel's freewheeling comity inquiry invites the Judiciary to second guess Congress's power to define the scope of federal subject-matter jurisdiction based upon foreign policy considerations that the Constitution commits to the Executive. Review in this Court is warranted and necessary on all three questions.

ARGUMENT

A. This Court Should Decide Whether *Ortiz* Extends to Orders Denying a Motion to Dismiss.

1. Respondents do not dispute that the panel's exercise of appellate jurisdiction over an interlocutory pre-trial motion to dismiss, following a full trial on the merits, conflicts with the weight of circuit precedent

interpreting *Ortiz* v. *Jordan*, 562 U.S. 180 (2011). Unable to identify even one post-*Ortiz* decision supporting the panel's decision, Respondents conflate the substantive defense of comity with the procedural vehicles by which such a defense may be raised on appeal. All of Respondents' arguments are distractions from the conclusion that flows naturally from *Ortiz*: following trial, the panel lacked jurisdiction to adjudicate Respondents' pre-trial motion to dismiss as if the trial had never occurred.

2. Following *Ortiz*, and until the decision below, the courts of appeals consistently held that interlocutory motions to dismiss under Rule 12 may not be appealed after a trial pursuant to 28 U.S.C. § 1291. Pet. 19-20. Respondents do not dispute this, but instead submit that *Ortiz* is inapplicable because the defense of comity "implicates" a court's subject-matter jurisdiction. Opp. 30. But Respondents have never challenged the District Court's subject-matter jurisdiction. The doctrine of "international comity" is a discretionary abstention doctrine, raised as an affirmative defense, and plaintiffs have no burden to show the *absence* of comity concerns to establish jurisdiction. *See Drexel Burnham Lambert Grp. Inc.* v. *Galadari*, 777 F.2d 877, 880 (2d Cir. 1985). Thus, the principle that courts must ensure subject-matter jurisdiction at every stage of litigation is inapposite.

Even if "reversal with instruction to dismiss is . . . the only appropriate course if the district court erred in exercising jurisdiction," Opp. 14, that banal principle confuses trial court and appellate jurisdiction, which are governed by different statutes. In all of

Respondent's cited cases, appellate jurisdiction was established by a provision other than § 1291, and in each case that jurisdiction ran to a final order of the district court. *Raines* v. *Byrd*, 521 U.S. 811, 817-18 (1997); *Moore* v. *Sims*, 442 U.S. 415, 435 (1979); *Briscoe* v. *Bell*, 432 U.S. 404, 415 (1977).

The assertion that "the jury has no role" in a comity defense, Opp. 13, also misses the mark. Factual considerations are part of the ten factor "comity balancing test." App. 15a-16a. The District Court appropriately reserved for itself the interpretation of Chinese law (including facts relevant to that determination), while permitting the jury to receive evidence relevant to the factual underpinnings of Respondents' foreign sovereign compulsion and international comity defenses, App 42a-43a, 143a, including whether Chinese law as articulated by the Ministry was *ever* enforced as such. App. 14a-16a. The District Court appropriately exercised its discretion to postpone consideration of the multifarious *Timberlane* factors until a more thorough record than existed before trial. Pet. 21 n.6 (collecting cases). Once developed, that record cannot be retroactively erased. *Ortiz*, 562 U.S. at 184.

2. Respondents misleadingly claim that the post-*Ortiz* cases involved Rule 12(b)(6) motions, whereas Respondents supposedly "moved to dismiss *principally* under Rule 12(b)(1)." Opp. 12 (emphasis added). But Respondents moved to dismiss citing *both* Rule 12(b)(1) *and* 12(b)(6) in the alternative, noting authority holding that such defenses fall under Rule 12(b)(6)—including *Timberlane* itself. Dkt. 67 at 3, Case No. 06-

md-1738 (E.D.N.Y. Sept. 22, 2006). Rule 12(b)(1)'s text addresses motions to dismiss for "lack of subject matter jurisdiction," whereas the comity defense argues that a court should decline subject-matter jurisdiction that it otherwise could lawfully exercise. Further, Rule 12 merely specifies procedural mechanisms for raising defenses in a district court. Whatever the vehicle—(b)(1) or (b)(6)—a court of appeals only has jurisdiction to review "final decisions" resulting from their disposition. 28 U.S.C. § 1291.

Respondents argue that "appellate courts routinely review, after a full trial on the merits, orders involving Rule 12(b)(1) motions to dismiss," Opp. 15, but fail to cite a single case that involved § 1291 review of a pretrial order after trial. For example, in *Arbaugh* v. *Y&H Corp.*, 546 U.S. 500 (2006), Opp. 15, the defendant moved to dismiss for lack of subject-matter jurisdiction *after* trial; the district court *granted* the motion, and the court of appeals affirmed that final order. *Id.* at 504. In any event, the question is not whether courts may review orders "involving" 12(b)(1) motions when those motions are properly raised after trial, but whether an appellate court may review an interlocutory pre-trial order, after trial, based on the pre-trial factual record.

3. Respondents' vehicle concerns are overstated. Certiorari is warranted to ensure the uniformity and integrity of appellate jurisdiction under 28 U.S.C. § 1291. *See* Sup. Ct. R. 10. And the question is cleanly presented because the panel reviewed and ruled on only the motion to dismiss. App. 2a n.2. The hypothetical question whether the panel could have

granted the same relief based upon the comity defense in Respondents' Rule 50 motion is at most an issue for remand. *See Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012).

The panel's improper exercise of jurisdiction over Respondents' motion to dismiss was likely dispositive, Pet 22, but at minimum it was not harmless. Sitting in 2016, the panel purported to freeze the record as it existed in 2006, and held that the District Court abused its discretion in failing to abstain at the outset of the case. App. 2a n.2, 4a n. 3, 36a-37a & n.14. Even so, the panel cited material from *outside* the motion-to-dismiss record. App. 35a-36a. Conversely, by purporting to limit its review to the motion-to-dismiss record, the panel excluded evidence of China's contradictory statements to the WTO about the meaning of its own laws that—even if Respondents' reading of the panel's standard is correct—should have changed its analysis. App. 74a.

Respondents wrongly suggest that Petitioners failed to raise an *Ortiz* argument below. Opp. 12-13. Respondents did not urge review of their motion to dismiss in their merits briefing below, Pet. 16 n.4, instead invoking § 1291 jurisdiction over the District Court's final orders. Dkt. 175 at 2-3, No. 13-4791 (2d Cir. Aug. 11, 2014). Petitioners cited *Ortiz* in response to Respondents' attempt to re-litigate the District Court's pretrial orders. Dkt. 174 at 27, No. 13-4791 (2d Cir. Aug. 11, 2014). Petitioners could not have anticipated that the panel would review an order outside its § 1291 jurisdiction, and timely objected to that error in the rehearing petition. App. 280a.

B. This Court Should Resolve the Longstanding Split on the Standard of Deference Owed to Foreign Sovereign Interpretations of Foreign Law.

1. Respondents do not contest that the second question presented is vitally important, that further percolation would be pointless, or that the standard of deference was dispositive below. Instead, Respondents attempt to minimize the split and argue the merits.

2. The split of authorities is real and persistent. Respondents' attempt to harmonize the facts of each conflicting case fails to make the cases' legal tests compatible. The Sixth and D.C. Circuits perform an independent analysis of foreign law, regardless of a foreign sovereign's contrary arguments, Pet. 24-25, and the D.C. Circuit has openly questioned whether *any* standard of deference is permissible, Pet. 24. The Eleventh Circuit holds that while a foreign government's amicus brief is a "logical" place to look for "reliable and accurate" information, it is not entitled to conclusive deference, nor (in circumstances like this very case) any at all. Pet. 25-26. In the Fifth Circuit, courts "*may* defer to foreign government interpretations," Pet. 26, while in the Seventh Circuit, courts must give those interpretations "substantial deference" akin to *Chevron* deference, Pet. 26-27.

Nor can the cases underlying the split be distinguished on their facts. Respondents attempt, for example, to distinguish the Fifth Circuit's *Access Telecom* case by arguing that the Mexican agency was not "authorized to interpret, rather than simply

enforce, Mexican law." Opp. 20. But the Second Circuit never held that the Chinese Commerce Ministry possesses the authority to interpret law within the Chinese legal system—instead, it recognized only that the Chinese Ministry is the "highest authority within the Chinese government authorized to regulate foreign trade." Opp. 20 (citing App. 6a).

Respondents assert that the Eleventh Circuit's *McNab* case "did not even concern the meaning of Honduran law," yet simultaneously admit that the "question in *McNab* was . . . whether Honduran regulations were valid during the relevant time period." Opp. 20). The *McNab* court conducted an independent analysis of Honduran law and refused to grant conclusive deference to the interpretation asserted in the Honduran government's amicus brief. Opp. 21. Respondents separately attempt to distinguish *McNab* on the grounds that Honduras had previously asserted a conflicting interpretation of the law at issue, but so too here: the Chinese government made contradictory representations to the U.S. government and the WTO regarding its purported de-regulation of the Chinese Vitamin C market in 2001. App. 74a.

Contrary to Respondent's assertion, Opp. 21, the D.C. Circuit's *McKesson* case clearly involved an interpretation of Iranian law. The *McKesson* court unambiguously rejected Iran's interpretation of the Treaty of Amity as construed under Iranian law. *McKesson Corp.* v. *Islamic Republic of Iran*, 672 F.3d 1066, 1078 (D.C. Cir. 2012) ("We hold that the Treaty

of Amity, construed under Iranian law, provides McKesson with a private right of action . . . .").

In *Carranza*, the Sixth Circuit afforded no deference to El Salvador's amicus brief, which argued that a statement of extraterritorial application in the Salvadorean Amnesty Law would have been superfluous. Instead, the Sixth Circuit engaged in its own, independent interpretation of the Amnesty Law, which it held not to apply extraterritorially. Pet. 25.

Respondents attempt to harmonize the decision below with the Seventh Circuit's *In re Oil Spill* case by arguing that both decisions merely adopt a deference standard similar to what an administrative agency would receive under *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984). But the panel's conclusive deference standard and *Chevron* deference are different. For example, an administrative agency would not receive *Chevron* deference in this case, because *Chevron* does not apply to "informal agency actions" like agency amicus briefs. *Matz* v. *Household Int'l Tax Reduction Inv. Plan*, 388 F.3d 570, 573 (7th Cir. 2004). Further, deference is not warranted where an agency's interpretive position conflicts with a prior interpretation, appears to have been created for the purposes of litigation, or is merely a post-hoc rationalization—each of which the record showed here. Pet. 14; App. 88a, 120a; *Christopher* v. *SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2166-67 (2012); *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988).

The panel itself admitted that the District Court's "careful and thorough treatment of the evidence before it" would have been "entirely appropriate," but for the *sole* fact that the Chinese government filed an amicus brief in the litigation. App. 30a n.10. That standard amounts to conclusive deference to a foreign sovereign simply by virtue of appearance, which is plainly incompatible with the approaches in five other circuits. Pet. 24-27.

3. Respondents' merits defenses, Opp. 17-20, 24-27, do not counsel against certiorari. Even modest disagreement among the lower courts on the standard of deference owed to foreign sovereigns is intolerable; here, the need for review is urgent. Pet. 28-29.

Respondents point to *United States* v. *Pink*, 315 U.S. 203 (1942), but as evidenced by the disarray in the lower courts, Pet. 24-27, *Pink* has failed to provide clear guidance. *Pink* held only that the "official declaration" of a Russian body with "power to interpret existing Russian law," requested and received "through diplomatic channels" so as to clarify whether a particular Russian decree applied extraterritorially, would be treated as "conclusive so far as the intended extraterritorial effect" of that decree was concerned. *Pink*, 315 U.S. 203, 219-220 (1942). *Pink* was decided in an era in which foreign law was treated as a question of "fact," and offered no further guidance on how to treat foreign sovereign legal interpretations generally, including when the foreign sovereign appears as a litigant. And as the District Court noted, there is doubt whether *Pink* survived the promulgation of Rule 44.1, which assigns responsibility for

interpreting foreign law to the federal courts. App. 95a-96a, 180a-181a.

Respondents' merits defense at Opp. 17-19 only highlights the panel's errors. Two district court judges found compelling evidence to doubt Respondents' claim that the 2002 regime of "self-discipline" legally compelled Chinese companies to violate U.S. antitrust law. That evidence showed, *inter alia*, that the China declared that it had ceased administering Vitamin C exports at the end of 2001, App. 74a, that the Chamber eliminated the requirement that exporters be members of the Vitamin C Subcommittee in 2002, App. 132a-134a, and that the Chamber's own documents revealed that Vitamin C "verification and chop" requirements were not enforced by 2003. App. 149a. The Ministry was unable to explain (apart from conclusory declarations about the complexity of Chinese law) why a system of voluntary coordination, managed by a voluntary membership organization, which declined to impose any sanctions for deviations from purportedly-mandatory coordination, should be treated as "compulsory" for purposes of U.S. antitrust law.[1] Only conclusive deference, blind to any evidence outside the

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[1] Respondents misleadingly claim that Petitioners conceded that Chinese law compelled coordination. Opp. 17. That assertion relies upon an out-of-context quotation, as demonstrated by the surrounding text in the same brief, including: "this is a case of voluntary agreements where no outside compulsion from the Chamber happened." Dkt. 174 at 25-26, No. 13-4791 (2d Cir. Aug. 11, 2014).

four corners of the Ministry's brief, could permit such a conclusion.

Respondents assert that "Petitioners cannot point to any case where a foreign sovereign has subverted a U.S. tribunal by falsely asserting a conflict between its law and U.S. law or by manufacturing such a conflict for purposes of litigation," Opp. 25, but this case involves precisely that scenario. The record showed that the Chinese government collaborated with Respondents to manufacture a comity defense in order to shield Respondents from U.S. liability. App. 88a. The Second Circuit's rule of conclusive deference prevented it from considering that evidence, along with other evidence that contradicted China's submission. App. 74a, 95a, 97a.

C. This Court Should Clarify Whether Courts Have Discretion to Abstain from Otherwise Valid Sherman Act Jurisdiction over Foreign Conduct.

1. This Court should also grant review to decide whether federal courts have the discretion to decline jurisdiction over antitrust claims based on the case-by-case application of a multifactor balancing test. The question is important on its own merits, but is even more urgent if Respondents are correct that a comity-abstention defense may be adjudicated at any stage of the litigation, on any record that a court prefers, and even by a court *sua sponte*.

2. Prior to *Hartford Fire*, the circuits "were divided over whether they could abstain from exercising jurisdiction on a case-by-case basis as a matter of

international comity." Br. Amicus Curiae of William S. Dodge and Paul B. Stephan at 11. Since this Court reserved that question in *Hartford Fire*, the situation has not improved. Five circuits each employ five distinct versions of such a "balancing test," each considering anywhere from three-to-ten factors. App. 15a-16a (ten factors); *Montreal Trading Ltd.* v. *Amax Inc.*, 661 F.2d 864 (10th Cir. 1981) (five and six factors); *In re Uranium Antitrust Litig.*, 617 F.2d 1248, 1255 (7th Cir. 1980) (three); *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287, 1297-98 (3d Cir. 1979) (ten); *Timberlane Lumber Co.* v. *Bank of Am., N.T. & S.A.*, 549 F.2d 597, 613-614 (9th Cir. 1976) (seven). Considering that this Court has never countenanced discretionary abstention from antitrust jurisdiction, it is puzzling to describe the *Timberlane* family of abstention doctrines as "settled law." Opp. 28. Far from "settled," the "comity balancing test" is a recent, amorphous, and anomalous abstention doctrine that conflicts with this Court's rejection of case-by-case abstention. Pet. 30-33.

Respondents are wrong to suggest that courts have "flexibility" to take or decline jurisdiction based solely upon a judge's prediction about the diplomatic consequences of litigation. Opp. 25. The Executive manages U.S. diplomacy, and Congress determines the scope of federal subject-matter jurisdiction, which courts "have a strict duty to exercise." *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706, 716 (1996). The Second Circuit's "comity balancing test" is a judge-made end run around Congress's judgment that federal courts should exercise jurisdiction over claims that arise

under the Sherman Antitrust Act. 15 U.S.C. §§ 1, 6a, 15; 28 U.S.C. § 1331.

3. This Court has discretion to review questions "fairly included" within other questions presented, *Rumsfeld* v. *F.A.I.R., Inc.*, 547 U.S. 47, 56 (2006), and even to grant review of questions not squarely presented and litigated below, when a case is otherwise before the Court on § 1254 jurisdiction. *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992). There is therefore no obstacle to reviewing this question with the other questions presented.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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